

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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MARY ALEXANDER, an individual; )  
ASHLEY BALL, a minor, by and through her )  
Guardian, Mary Alexander; EVERETTE )  
BALL, a minor, by and through his Guardian, )  
Mary Alexander, )

03:05-CV-00178-LRH-RJJ

Plaintiffs, )

ORDER

v. )

GARY UNDERHILL, in his official and )  
individual capacity; BO LORENTZEN, in his )  
official and individual capacity; RAY PRICE, )  
in his official and individual capacity; MIKE )  
MIERAS, in his official and individual )  
capacity; EDDIE BONINE, in his official and )  
individual capacity; TOM KALLAY, in his )  
official and individual capacity; DEBBIE )  
CYLKE, in her official and individual )  
capacity; WASHOE COUNTY SCHOOL )  
DISTRICT; and DOES 1 through 10, )

Defendants. )

Presently before the court is a Motion to Dismiss (# 22<sup>1</sup>) filed by defendants Gary Underhill, Bo Lorentzen, Ray Price, Mike Mieras, Eddie Bonine, Tom Kallay, Debbie Cylke and Washoe County School District (collectively, “Defendants”). Plaintiffs Mary Alexander, Ashley

<sup>1</sup> All references to (# XX) refer to the court’s docket.

1 Ball and Everette\ Ball (collectively, "Plaintiffs") filed an opposition (# 24) to which Defendants  
2 subsequently replied (# 27). Plaintiffs have also filed a Supplement to Plaintiffs' Motion to  
3 Dismiss (# 30) to which Defendants responded (# 33).

4 Also before the court is Plaintiffs' Request for Taking Judicial Notice (# 28). Defendants  
5 have filed an objection (# 29) to which Plaintiffs replied (# 31).

#### 6 **I. Factual Background**

7 This is an action for damages arising out of the treatment of Plaintiffs following an affray at  
8 Hug High School ("HHS") in Reno, Nevada. HHS is within the Washoe County School District.  
9 Mary Alexander ("Alexander"), an African-American female, is the mother of two minor children,  
10 Ashley Ball ("Ashley") and Everette Ball ("Everette"). Ashley and Everette are students at HHS.

11 On October 7, 2004, Alexander took her children to HHS for Ashley to pick up a book.  
12 While at the school, Ashley and several African-American female friends were involved in a fight  
13 with several Hispanic female students. School police officers arrived after the fight had concluded  
14 and, according to Plaintiffs, began arresting all the African-American students in the vicinity  
15 without knowing who participated in the fight. Ashley and Everette were both arrested.

16 Alexander became distraught at the sight of her children being arrested. At this time, a  
17 school employee approached Alexander and asked her why she could not control her kids.  
18 Alexander responded with profanity. Alexander then went to the school office to find out where  
19 the school police officers took her children and learned that Ashley was in the back office. When  
20 Alexander approached the back office, Gary Underhill ("Underhill"), a school police officer, told  
21 Alexander that she could not see Ashley. Alexander complied and waited in the office until a  
22 student told her that Ashley was still in the back office. At this point, Alexander approached the  
23 back office for the second time. Underhill quickly shut the door and informed Alexander that she  
24 was under arrest.

25 Alexander was booked at county jail and released on her own recognizance. She was later  
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1 convicted of violating County Ordinance 53.200, Resisting a Public Officer. Ashley and Everette  
2 were taken to juvenile hall. Ashley was released that night and Everette was released the next day.  
3 On October 10, 2004, Plaintiffs met with Eddie Bonine (“Bonine”), an administrator in charge of  
4 student services, and were informed that Ashley and Everette were both suspended and removed  
5 from HHS.

## 6 **II. Legal Standard**

7 In considering “a motion to dismiss, all well-pleaded allegations of material fact are taken  
8 as true and construed in a light most favorable to the non-moving party.” *Wylar Summit P’Ship v.*  
9 *Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). However, a court  
10 does not necessarily assume the truth of legal conclusions merely because they are cast in the form  
11 of factual allegations in plaintiff’s complaint. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-  
12 55 (9th Cir. 1994).

13 There is a strong presumption against dismissing an action for failure to state a claim.  
14 *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted). “The issue is  
15 not whether a plaintiff will ultimately prevail but whether [he or she] is entitled to offer evidence in  
16 support of the claims.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds*  
17 *by Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). Consequently, the court should not grant a  
18 motion to dismiss “for failure to state a claim unless it appears beyond doubt that the plaintiff can  
19 prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*,  
20 355 U.S. 41, 45-46 (1957); *see also Hicks v. Small*, 69 F.3d 967, 969 (9th Cir. 1995).

## 21 **III. Discussion**

22 On March 28, 2005, Plaintiffs filed a complaint alleging twelve claims for relief: violation  
23 of their Fourth and Fourteenth Amendment rights enforceable through 42 U.S.C. § 1983; violation  
24 of Title VI of the Civil Rights Act, 42 U.S.C. § 2000d; Violation of their Procedural Due Process  
25 Rights enforceable through 42 U.S.C. § 1983; conspiracy in violation of 42 U.S.C. § 1985; a  
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1 violation of 42 U.S.C. § 1986; battery; false imprisonment; intentional infliction of emotional  
 2 distress; negligent infliction of emotional distress; violation of sections 388.132-388.135 of the  
 3 Nevada Revised Statutes; negligent supervision and training; and violation of administrative  
 4 regulations. Defendants are seeking to dismiss all of these claims. In their opposition to  
 5 Defendants' Motion to Dismiss, Plaintiffs have acquiesced in dismissal of their claims arising  
 6 under section 1985, section 1986 and Nevada Revised Statute sections 388.132-388.135. The  
 7 court will discuss the remaining arguments relevant to each claim for relief in turn.

#### 8 **A. Federal Claims**

##### 9 **1. 42 U.S.C. § 1983**

10 Plaintiffs' first claim for relief is brought pursuant to 42 U.S.C. § 1983. Ashley and  
 11 Everette allege violations of both the Fourth and Fourteenth Amendments to the United States  
 12 Constitution. Alexander's section 1983 claim alleges a violation of her Fourth Amendment rights  
 13 based upon an allegedly unlawful arrest.

##### 14 **a. Ashley and Everette's Equal Protection Claim is Subsumed by Title VI**

15 In seeking dismissal of the first claim for relief, Defendants note that Ashley and Everette's  
 16 second claim for relief, based upon the same set of facts alleged for the constitutional claims,  
 17 alleges that Everette and Ashley were discriminated against based upon their race in violation of  
 18 Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Since the first two claims for relief  
 19 are based upon the same set of facts, Defendants argue that Ashley and Everette's section 1983  
 20 claim is subsumed by the Title VI claim and must be dismissed. In opposition, Ashley and  
 21 Everette argue that their section 1983 claims are not subsumed by Title VI because "the underlying  
 22 elements of the claims are different, the parties are different, and the remedies are different."<sup>2</sup>

23 42 U.S.C. § 1983 supplies a cause of action to a plaintiff when a person acting under the  
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25 <sup>2</sup>Plaintiffs have agreed to dismiss the individual defendants and the request for punitive damages  
 26 pursuant to Title VI as Title VI does not provide for such relief.

1 color of law deprives that plaintiff of any “rights, privileges, or immunities secured by the  
2 Constitution and laws [of the United States.]” However, “[w]hen the remedial devices provided in  
3 a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional  
4 intent to preclude the remedy of suits under § 1983.” *Middlesex County Sewerage Auth. v. Nat’l*  
5 *Sea Clammers Ass’n*, 453 U.S. 1, 20 (1981). In determining whether an act subsumes a section  
6 1983 action, the court must determine whether Congress intended that act to supplant any remedy  
7 that would otherwise be available under section 1983. *Id.* at 21. Such Congressional intent may be  
8 found directly in the statute creating the right or inferred when the statutory scheme is incompatible  
9 with individual enforcement under section 1983. *City of Rancho Palos Verdes, Cal. v. Abrams*,  
10 125 S.Ct. 1453, 1458 (2005). The defendant bears the burden of demonstrating that Congress has  
11 expressly withdrawn the section 1983 remedy. *Golden State Transit Corp. v City of Los Angeles*,  
12 493 U.S. 103, 107 (1989).

13 The Ninth Circuit has not decided the specific issue of whether section 1983 is subsumed by  
14 Title VI. However, the Ninth Circuit has recognized the Supreme Court’s *Sea Clammers* doctrine  
15 when construing other federal statutes and found that those statutes precluded a section 1983  
16 remedy. *See, e.g., Dittman v. California*, 191 F.3d 1020 (9th Cir. 1999); *Dep’t of Educ., State of*  
17 *Hawaii v. Katherine D.*, 727 F.2d 809 (9th Cir. 1984). In addition, the District of Nevada has  
18 recognized that a section 1983 action is barred in the context of Title IX of the Education  
19 Amendments Act of 1972, 20 U.S.C. § 1681 *et seq.* *Henkle v. Gregory*, 150 F.Supp.2d 1067 (D.  
20 Nev. 2001).

21 In the present case, this court is called upon to decide whether Title VI serves to bar an  
22 action brought pursuant to section 1983. While Title VI does not explicitly purport to limit section  
23 1983 relief, 42 U.S.C. § 2000d, congressional intent to foreclose such a remedy can still be inferred  
24 from the creation of a comprehensive statutory scheme. *Sea Clammers*, 453 U.S. at 20. Therefore,  
25 the first question this court must decide is whether Title VI is sufficiently comprehensive to  
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1 demonstrate the congressional intent to foreclose a section 1983 remedy. If Title VI is sufficiently  
 2 comprehensive, the court must determine whether Plaintiffs' section 1983 claims seek to remedy  
 3 conduct that is within the scope of Title VI. Only section 1983 claims that are within the scope of  
 4 a comprehensive statutory scheme are subsumed by that scheme. *See Smith v. Robinson*, 468 U.S.  
 5 992, 1003 n.7 (1984) *superseded by* Education of the Handicapped Act, § 615(e)(4), as amended,  
 6 20 U.S.C. § 1415(e)(4).

7 The courts are split as to whether Title VI subsumes section 1983. The Seventh Circuit<sup>3</sup>  
 8 and the Western District of New York<sup>4</sup> have found that Title VI is sufficiently comprehensive to  
 9 preclude a plaintiff from bypassing its enforcement mechanisms through a section 1983 action.  
 10 Conversely, the Third Circuit<sup>5</sup> and the First Circuit<sup>6</sup> have found that Title VI is not sufficiently  
 11 comprehensive. After examining the relevant case law and the statutory scheme of Title VI, this  
 12 court concludes that Title VI is sufficiently comprehensive so as to evince the congressional intent  
 13 to foreclose a section 1983 remedy.

14 As mentioned previously, this district has found that Title IX is sufficiently comprehensive  
 15 to foreclose a section 1983 remedy. *Henkle*, 150 F.Supp.2d at 1074. Title IX was patterned after  
 16 Title VI and is enforced and interpreted in the same manner as Title VI. *Barnes v. Gorman*, 536  
 17 U.S. 181, 185 (2002) (citations omitted); *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001)  
 18 (citations omitted). As with Title IX, the court finds that Title VI contains a comprehensive  
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21 <sup>3</sup>*Boulahanis v. Bd. of Regents*, 198 F.3d 633, 641 (7th Cir. 1999).

22 <sup>4</sup>*Bayon v. State Univ. of New York at Buffalo*, 2001 WL 135817, \*3 (W.D.N.Y. 2001).

23 <sup>5</sup>*Powell v. Ridge*, 189 F.3d 387, 402 (3d Cir. 1999) *overruled on other grounds by Alexander v.*  
 24 *Sandoval*, 532 U.S. 275 (2001).

25 <sup>6</sup>*Cousins v. Sec'y of the United States Dep't of Transp.*, 857 F.2d 37, 44-45 (1st Cir. 1988) (indicating  
 26 that Title VI remedies, sought pursuant to section 505 of the Rehabilitation Act of 1973, are not "so  
 comprehensive as to indicate a congressional intent to foreclose alternate avenues of relief").

1 administrative enforcement scheme.<sup>7</sup> See 34 C.F.R. § 100.1 *et seq.*; *Henkle*, 150 F.Supp.2d at  
2 1073.

3 Title VI's administrative scheme allows persons who believe they were discriminated  
4 against to file a written complaint with the responsible department official. 34 C.F.R. § 100.7(b).  
5 A complaint that indicates noncompliance with Title VI triggers a prompt investigation. 34 C.F.R.  
6 § 100.7(c). If the investigation reveals a failure to comply with Title VI, the department will take  
7 steps necessary to ensure compliance. 34 C.F.R. §§ 100.7, 100.8, 100.9. Although these  
8 regulations do not provide a monetary remedy for a complainant who was discriminated against,  
9 the regulations do provide a process designed to effectuate compliance with Title VI. A federally  
10 funded entity that does not comply with Title VI may ultimately lose its federal financial  
11 assistance. 34 C.F.R. § 100.8. In addition to the administrative remedies, Title VI contains an  
12 implied private cause of action through which individuals can obtain both injunctive relief and  
13 damages. *Sandoval*, 532 U.S. at 279.

14 An additional consideration in determining whether a particular statutory scheme should bar  
15 a section 1983 action, apart from administrative and private remedies, is whether that scheme  
16 provides a more restrictive private remedy for statutory violations than would otherwise be  
17 available pursuant to section 1983. *Abrams*, 125 S.Ct. at 1458. In the context of Title VI, the  
18 Supreme Court has recognized that the available remedies should sometimes be limited to  
19 declaratory and injunctive relief. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 595-97  
20 (1983). Furthermore, a Title VI plaintiff can only seek recovery from the recipient of the federal  
21 funding. *Shotz v. City of Plantation*, 344 F.3d 1161, 1169-70 (11th Cir. 2003). In other words,  
22 individuals may not be held liable under Title VI. *Id.*

23 Given the fact that Title VI offers an administrative enforcement scheme, a private right of  
24 action and damages that are more restrictive than those available through section 1983, the court  
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26 <sup>7</sup>In fact, Title IX relies on many of the provisions applicable to Title VI. 34 C.F.R. § 106.71.

1 finds that a remedy under section 1983 for conduct within the scope of Title VI would be  
2 incompatible with Title VI. *See Abrams*, 125 S.Ct. at 1458. Title VI provides the exclusive  
3 mechanism for recovery to individuals who were discriminated against on the basis of race by any  
4 program or activity receiving federal financial assistance. *See* 42 U.S.C. § 2000d.

5 Although the court has concluded that Title VI subsumes a section 1983 remedy, the inquiry  
6 does not end here. The next question seeks to determine which section 1983 remedies are  
7 subsumed by Title VI. In *Henkle*, the court stated that the plaintiff could not bring a constitutional  
8 equal protection claim based upon the same facts as a Title IX claim. 150 F.Supp.2d at 1074.  
9 Relying on *Smith*, the *Henkle* court found that “it would be inconsistent to allow a plaintiff to  
10 circumvent [the Title IX] scheme by pursuing an equal protection claim under § 1983 based upon  
11 the same set of facts.” *Id.* This inconsistency would result from allowing a plaintiff to bypass the  
12 scheme Congress created to remedy such violations. However, this reasoning is inapplicable  
13 where a plaintiff brings a cause of action pursuant to section 1983 to redress conduct that is outside  
14 the scope of the statutory scheme. *See Smith*, 468 U.S. at 1003 n.7 (“Claims not covered by the  
15 EHA should still be cognizable under § 1983, with fees available for such actions.”).

16 In the case at bar, Plaintiffs’ first cause of action alleges violations of the Fourth  
17 Amendment and the Equal Protection Clause of the Fourteenth Amendment. In order to determine  
18 whether these claims for relief are subsumed by Title VI, the court must determine whether Title  
19 VI proscribes the alleged conduct for which Plaintiffs are seeking relief. Title VI provides that  
20 “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded  
21 from participation in, be denied the benefits of, or be subjected to discrimination under any  
22 program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d.

23 Ashley and Everette’s Equal Protection claim alleges that they were denied the same  
24 treatment as other students on account of their race. The court finds that such allegations fall  
25 squarely within the conduct that Title VI was designed to remedy. Title VI essentially proscribes  
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1 conduct that would violate the Equal Protection Clause of the Fourteenth Amendment. *Regents of*  
2 *Univ. of California v. Bakke*, 438 U.S. 265, 287 (1978) (“Title VI must be held to proscribe only  
3 those racial classifications that would violate the Equal Protection Clause of the Fifth  
4 Amendment.”). However, as previously discussed, the remedies available under Title VI are  
5 different than those that would otherwise be available pursuant to section 1983. Because Congress  
6 enacted a statutory scheme sufficiently comprehensive to remedy racial discrimination committed  
7 by an entity receiving federal financial assistance, Plaintiffs cannot pursue a section 1983 remedy  
8 for the same conduct.

9 The court, however, reaches a different result with respect to Ashley and Everette’s Fourth  
10 Amendment claims. Ashley and Everette allege that their detentions and arrests were made  
11 without probable cause or reasonable suspicion and that Everette’s arrest was effectuated through  
12 the use of excessive force. The court finds that this claim is not subsumed by Title VI as Title VI  
13 was not intended to remedy instances of unreasonable seizures in violation of the Fourth  
14 Amendment. Although Ashley and Everette allege a discriminatory motive behind their arrests, the  
15 cause of action asserts a claim for unreasonable seizure rather than discrimination. In addition,  
16 Alexander acknowledges that she cannot bring a Title VI claim. Thereofre, Title VI cannot  
17 subsume Alexander’s section 1983 claim.

#### 18 **b. Qualified Immunity**

19 After the foregoing discussion on whether claims brought under section 1983 are subsumed  
20 by Title VI, the court is left with the alleged Fourth Amendment violations against Defendants.<sup>8</sup> In  
21 seeking summary judgment, Defendants argue that the individually named defendants, Bonine and  
22 Debbie Cylke (“Cylke”), are entitled to qualified immunity. Specifically, Defendants argue that the  
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24 <sup>8</sup>As mentioned previously, Alexander’s section 1983 claim is “based upon her unlawful arrest for  
25 disturbance of school.” Therefore, it appears that Alexander’s first claim for relief is only asserting a violation  
26 of her Fourth Amendment rights. In addition, Plaintiffs have concurred in dismissing their Fourth Amendment  
claims against defendants Mike Mieras and Tom Kallay.

1 “Complaint fails to show any affirmative act by Defendants [Bonine and Cylke] that set in motion  
2 the alleged Fourth Amendment violations by Defendant Underhill, or otherwise.” Bonine is an  
3 administrator for Washoe County School District and Cylke is an Area Superintendent.

4 State officials are provided with a qualified immunity against section 1983 claims “insofar  
5 as their conduct does not violate clearly established statutory or constitutional rights of which a  
6 reasonable person would have known.” *Spoklie v. Montana*, 411 F.3d 1051, 1060 (9th Cir. 2005);  
7 *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This immunity is granted broadly and “provides  
8 ample protection to all but the plainly incompetent or those who knowingly violate the law.”  
9 *Moran v. Washington*, 147 F.3d 839, 844 (9th Cir. 1998) (quoting *Malley v. Briggs*, 475 U.S. 335,  
10 341 (1986)).

11 In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court established a two-step  
12 evaluation of qualified immunity, which has also been adopted by the Ninth Circuit. *See, e.g.*,  
13 *Johnson v. County of Los Angeles*, 340 F.3d 787, 791 (9th Cir. 2003); *Jackson v. City of*  
14 *Bremerton*, 268 F.3d 646, 651 (9th Cir. 2001). The first step taken by the court is to make a  
15 constitutional inquiry by determining the following issue: “based upon the facts taken in the light  
16 most favorable to the party asserting the inquiry, did the officer’s conduct violate a constitutional  
17 right?” *Johnson*, 340 F.3d at 791 (citing *Jackson v. City of Bremerton*, 268 F.3d 646, 651 (9th Cir.  
18 2001)); *Saucier*, 533 U.S. at 201. If the court finds that the officer’s conduct violated a  
19 constitutional right, the second step of the *Saucier* analysis is that the court determine whether the  
20 officer is entitled to qualified immunity. *Johnson*, 340 F.3d at 791-92. As part of its qualified  
21 immunity analysis, the court should consider whether the law governing the conduct was clearly  
22 established when the conduct occurred. *Robinson v. Solano County*, 278 F.3d 1007, 1012 (9th Cir.  
23 2001) (en banc). If the right violated was clearly established, the court should also decide “whether  
24 the officer could nevertheless have reasonably but mistakenly believed that his or her conduct did  
25 not violate a clearly established constitutional right.” *Id.* at 201-02; *Saucier*, 533 U.S. at 201-05.

1       The first step in the two-step process is intended to “set forth principles which will become  
2 the basis for a holding that a right is clearly established.” *Saucier*, 533 U.S. at 201. If a court were  
3 to skip this initial step, “[t]he law might be deprived of this explanation,” *id.*, thereby inhibiting the  
4 development of Fourth Amendment law. *See Robinson*, 278 F.3d at 1012. It is therefore necessary  
5 to first consider the constitutional inquiry. Only if the court determines that Plaintiffs’ Fourth  
6 Amendment rights were violated will the court address the immunity issue. *Johnson*, 340 F.3d at  
7 794-95; *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151.

8       The court notes that at this stage in the proceedings, the allegations contained in the  
9 complaint are viewed in the light most favorable to the Plaintiffs. Viewing the facts in this light,  
10 Plaintiffs have properly alleged violations of clearly established constitutional rights. *See Kaupp v.*  
11 *Texas*, 538 U.S. 626, 630 (2003) (requiring probable cause to effectuate a seizure); *Graham v.*  
12 *Connor*, 490 U.S. 386, 396-99 (1989) (discussing the Fourth Amendment right to be free from  
13 *unreasonable* seizures). Whether or not the Plaintiffs’ arrests lacked probable cause or were  
14 effectuated by using excessive force cannot be determined at this time.

15       However, Bonine and Cylke, as supervisory officials “can be held liable under section 1983  
16 ‘only if they play an affirmative part in the alleged deprivation of constitutional rights.’” *Graves v.*  
17 *City of Coeur D’Alene*, 339 F.3d 828, 848 (9th Cir. 2003) (quoting *Rise v. Oregon*, 59 F.3d 1556,  
18 1563 (9th Cir. 1995)). “Supervisory liability is imposed against a supervisory official in his  
19 individual capacity for his own culpable action or inaction in the training, supervision, or control of  
20 his subordinates; for his acquiescence in the constitutional deprivations of which the complaint is  
21 made; or for conduct that showed a reckless or callous indifference to the rights of others.” *Larez*  
22 *v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991) (internal quotations and citations  
23 omitted). In their complaint, Plaintiffs allege that their rights were violated because Defendants  
24 implemented discriminatory procedures, policies, and customs. Therefore, at this time, the court  
25 cannot say that Plaintiffs will be unable to offer facts to prove that Bonine and Cylke were  
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1 responsible for the alleged Fourth Amendment violations. Similarly, the court cannot determine  
2 whether Bonine and Cylke are entitled to qualified immunity at this time as it is not clear precisely  
3 what role, if any, these defendants played in the alleged violations.

4 Also, the court is cognizant of Defendants' arguments made pursuant to *Heck v. Humphrey*,  
5 512 U.S. 477, 486-87 (1994). Specifically, Defendants argue that a favorable judgment on  
6 Plaintiffs' section 1983 claim would necessarily imply the invalidity of Alexander's conviction for  
7 resisting arrest and the invalidity of certain juvenile proceedings against Ashley. Therefore,  
8 Defendants argue that *Heck* serves as a bar to one or more of Plaintiffs' section 1983 claims. At  
9 this stage of the proceedings, the facts relative to a *Heck* argument are not clearly before the court.  
10 For this reason, the court will reserve ruling on this issue at this time.

## 11 **2. Title VI of the Civil Rights Act of 1964**

12 Ashley and Everette's second cause of action alleges a violation of Title VI of the Civil  
13 Rights Act of 1964. As mentioned previously, Title VI provides that "[n]o person in the United  
14 States shall, on the ground of race, color, or national origin, be excluded from participation in, be  
15 denied the benefits of, or be subjected to discrimination under any program or activity receiving  
16 Federal financial assistance." 42 U.S.C. § 2000d. To properly plead a cause of action, a plaintiff  
17 must allege both that the defendant is an entity engaging in racial discrimination and that it is  
18 receiving federal funding. *Fobbs v. Holy Cross Health Sys. Corp.*, 29 F.3d 1439, 1447 (9th Cir.  
19 1994), *overruled in part on other grounds by Daviton v. Columbia/HCA Healthcare Corp.*, 241  
20 F.3d 1131 (9th Cir. 2001).

21 Defendants argue that this claim must be dismissed due to Plaintiffs' failure to allege that  
22 WUSD is a recipient of federal funds. Plaintiffs have responded by requesting this court to take  
23 judicial notice of the fact that the WUSD is a federally funded entity. This court may take judicial  
24 notice of facts that are generally known within the court's jurisdiction or capable of accurate and  
25 ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R.  
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1 Evid. 201(b). The court concludes that it is beyond reasonable dispute that the WCSD is a  
 2 federally funded entity. Such information is clearly that type which is generally known within the  
 3 territorial jurisdiction. Accordingly, the court will take judicial notice of the fact that the WCSD is  
 4 a federally funded entity. Therefore, dismissal of Ashley and Everett's Title VI claim is  
 5 inappropriate at this time.

### 6 **3. Procedural Due Process**

7 Ashley and Everett's third claim for relief alleges that Defendants Bonine, Cylke, and Tom  
 8 Kallay violated their right to free public education as secured by the Due Process Clause of the  
 9 Fourteenth Amendment.<sup>9</sup> Specifically, Plaintiffs allege that Ashley and Everett were suspended  
 10 from HHS without notice or an opportunity to be heard. Defendants, purportedly relying on  
 11 *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001), argue that Ashley and  
 12 Everett's Due Process claim must fail because Nevada law provides adequate post-deprivation  
 13 remedies for this alleged deprivation. Ashley and Everett, on the other hand, argue that their due  
 14 process rights were violated because the procedures in place were not followed.

15 It is undisputed that Nevada has created a property interest in a student's entitlement to a  
 16 public education. *See Nev. Const. art. XI, § 2; Goss v. Lopez*, 419 U.S. 565, 572-74 (1975). The  
 17 question this court must decide is whether Nevada's post-deprivation remedies prevent Ashley and  
 18 Everett from pursuing a Due Process claim. In *Parratt v. Taylor*, 451 U.S. 527 (1981), and  
 19 *Hudson v. Palmer*, 468 U.S. 517 (1984), the Supreme Court articulated the proposition that "in  
 20 certain circumstances, a state can cure what would otherwise be an unconstitutional deprivation of  
 21 'life, liberty, or property' by providing adequate postdeprivation remedies." *Zimmerman*, 255 F.3d  
 22 at 737. However, the availability of post-deprivation remedies will only cure an unconstitutional  
 23 deprivation when an official has acted in "random, unpredictable, and unauthorized ways." *Id.* at  
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25 <sup>9</sup>The court notes that although this claim for relief is brought pursuant to 42 U.S.C. § 1983, it is not  
 26 subsumed by Title VI as Title VI was not intended to remedy such conduct. *See* part A(1)(a) above.

1 738. Post-deprivation remedies cannot save an unconstitutional act when the official acted  
2 pursuant to an established procedure. *Id.*

3 In *Zinerman v. Burch*, the Supreme Court clarified the reach of *Parratt* and *Hudson* and  
4 found the analogy to those cases inapplicable where the deprivation is not unpredictable, a  
5 predeprivation process is not impossible or absurd, and the conduct of the defendants is not  
6 unauthorized. 494 U.S. 113, 136-39 (1990); *see also Zimmerman*, 255 F.3d at 738-39. The court  
7 finds the case at bar is governed by *Zinerman* and *Zimmerman* rather than *Parratt* and *Hudson*.

8 As with *Zinerman* and *Zimmerman*, the alleged deprivation of property occurred at a  
9 “specific, predictable point in the process,” when Plaintiffs met with Bonine on October 10, 2004,  
10 and were informed of the disciplinary actions taken against Everette and Ashley. Second, the  
11 circumstances of the disciplinary action did not make a predeprivation hearing absurd or  
12 impossible. In fact, section 392.467 of the Nevada Revised Statutes, as with the Oakland  
13 ordinance discussed in *Zimmerman*, explicitly states that a student will not be suspended or  
14 expelled until he has been given notice and an opportunity to be heard. Nev. Rev. Stat. §  
15 392.467(2). Finally, it is beyond dispute that “the school district may authorize the suspension or  
16 expulsion of any pupil from any public school within the school district.” Nev. Rev. Stat. §  
17 392.467(1). For these reasons, *Parratt* and *Hudson* do not protect the defendants in this action  
18 from a constitutional challenge.

19 Furthermore, the court finds, looking at the evidence in the light most favorable to Ashley  
20 and Everette, that a Due Process violation may have occurred. In *Goss*, the Supreme Court  
21 articulated what procedure is due before a student can be suspended for a short period of time. 419  
22 U.S. at 581.

23 Students facing temporary suspension have interests qualifying for protection of the  
24 Due Process Clause, and due process requires, in connection with a suspension of 10  
25 days or less, that the student be given oral or written notice of the charges against  
26 him and, if he denies them, an explanation of the evidence the authorities have and  
an opportunity to present his side of the story.

1 *Id.* However, the Supreme Court explained that there does not need to be a delay between the  
2 notice and the time of the hearing. *Id.* at 582. Rather, the student must be informed of the  
3 accusations against him and be given an opportunity to explain his version of the facts. *Id.*

4 In arguing that their due process rights were violated, Ashley and Everette claim that during  
5 their October 10, 2004, “meeting,” they were not informed of the charges, given an explanation of  
6 the evidence against them or given an opportunity to respond. Looking at these allegations in the  
7 light most favorable to Plaintiffs, the court cannot say that they will be unable to prevail under any  
8 set of facts. The court notes, however, that although Ashley and Everette describe the October 10,  
9 2004, meeting with Bonine as a “meeting” rather than a “hearing,” such an informal meeting may  
10 be sufficient to satisfy the dictates of due process. *See Goss*, 419 U.S. at 582.

#### 11 **B. State Law Claims**

12 In addition to the federal claims discussed above, Plaintiffs also bring state law claims  
13 alleging battery, false imprisonment, intentional infliction of emotional distress, negligent infliction  
14 of emotional distress, negligent supervision and training, and violation of administrative  
15 regulations.

16 Defendants argue they are entitled to immunity on these claims pursuant to Nevada Revised  
17 Statute section 41.032. Specifically, Defendants argue the actions of all Defendants were  
18 discretionary acts that cannot form the basis for a lawsuit in Nevada.

19 Section 41.032(2) of the Nevada Revised Statutes provides as follows:

20 no action may be brought under NRS 41.031 or against an immune contractor or an  
21 officer or employee of the State or any of its agencies or political subdivisions  
22 which is: [b]ased upon the exercise or performance or the failure to exercise or  
23 perform a discretionary function or duty on the part of the State or any of its  
agencies or political subdivisions or of any officer, employee or immune contractor  
or any of these, whether or not the discretion involved is abused.

24 Nev. Rev. Stat. § 41.032. “Discretionary acts are those which require the exercise of personal  
25 deliberation, decision and judgment.” *Travelers Hotel, Ltd. v. City of Reno*, 741 P.2d 1353, 1354  
26



(Nev. 1987) (citing *Parker v. Mineral County*, 729 P.2d 491, 493 (Nev. 1986)). An action can be brought, however, if the acts in question are merely “‘ministerial,’ amounting only to obedience to orders, or the performance of a duty in which the officer is left no choice of his own.” *Maturi v. Las Vegas Metro. Police Dep’t*, 871 P.2d 932, 934 (Nev. 1994).

### 1. State Claims Arising Directly From Arrest

The Nevada Supreme Court has specifically concluded that a police officer’s decision to make a traffic stop and arrest a person for failing to sign a traffic ticket are discretionary acts because they require the officer to use his judgment. *Ortega v. Reyna*, 953 P.2d 18, 23 (Nev. 1998). In the present case, Underhill used his discretion to determine when to detain Plaintiffs and how to treat them once detained. *See Maturi v. Las Vegas Metro. Police Dep’t*, 871 P.2d 932, 933 (Nev. 1994) (holding officer’s decision to handcuff suspect behind back instead of in front despite complaints of medical problems was discretionary). Accordingly, all state law claims arising directly out of Plaintiffs’ detention by Underhill are dismissed under Nevada’s state immunity law. These claims are battery, false imprisonment, intentional infliction of emotional distress and negligent infliction of emotional distress.

### 2. Negligent Supervision and Training

This court has held that the supervision and training of employees is not a discretionary act subject to immunity under Nevada Revised Statute 41.032. *Herrera v. Las Vegas Metro. Police Dep’t*, 298 F.Supp.2d 1043, 1054-55 (D. Nev. 2004). In addition, viewing the complaint in the light most favorable to Plaintiffs, the court cannot say that a claim for negligent supervision and training has not been stated. Plaintiffs have alleged that previous incidents occurred which demonstrated to Defendants that they were negligent in their supervision or training of Underhill. As such, Plaintiffs have at least pled the minimal requirements of the tort. *See Hall v. SSF, Inc.*, 930 P.2d 94, 99 (Nev. 1996) (noting that an “employer has a duty to use reasonable care in the training, supervision, and retention of his or her employees to make sure that the employees are fit



1 for their position”).

### 2 **3. Violation of Administrative Regulations**

3 Plaintiffs bring this claim pursuant to WCSD Administrative Regulation 5144.21 and  
 4 5144.16. WCSD Regulation 5144.21 provides a process for resolving complaints based on  
 5 discrimination, harassment and retaliation.<sup>10</sup> The WCSD Administrative Regulations do not  
 6 provide an explicit private right of action for violations of their requirements. However, in certain  
 7 circumstances courts will imply a private right of action into a statutory scheme. *See Cort v. Ash*,  
 8 422 U.S. 66, 78 (1975) (noting the four factors to consider when determining whether a private  
 9 right of action should be implied are (1) whether the plaintiff was one of the class for whose  
 10 special benefit the statute was enacted; (2) whether there was an indication of legislative intent to  
 11 create or deny such a remedy; (3) whether the remedy was consistent with the underlying purposes  
 12 of the legislative theme; and (4) whether the cause of action was one traditionally relegated to state  
 13 law so that it would be inappropriate to infer a cause of action based solely on federal law)<sup>11</sup>; *see*  
 14 *also Sports Form, Inc. v. LeRoy's Horse & Sports Place*, 823 P.2d 901, 902 (Nev. 1992) (noting  
 15 the factors in *Cort* are helpful for determining private right of actions in state statutes as well).

16 In this matter Plaintiffs are part of the class for which the regulations were created.  
 17 However, it is clear that the regulations do not contemplate court actions arising out of a failure to

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 19 <sup>10</sup> WCSD Regulation 5144.16 requires the school district to notify students facing a long-term  
 20 suspension of their right to an appeals process. As the underlying rationale for this regulation is not  
 21 significantly different than that discussed for Regulation 5144.21, the court adopts its reasoning for  
 Regulation 5144.21 to cover Regulation 5144.16.

22 <sup>11</sup> Some courts consider the *Cort* four factor test to be implicitly overruled and reduced to a  
 23 single factor test seeking to determine the congressional intent behind a statute. *See Parry v. Mohawk*  
 24 *Motors of Mich., Inc.*, 236 F.3d 299, 308 (6th Cir. 2000). However, the Ninth Circuit - although  
 25 recognizing the potential conflict between *Cort* and subsequent Supreme Court cases - and the Nevada  
 26 Supreme Court still consider the full four factor test relevant to determining if a private right of action  
 exists. *See First Pac. Bancorp, Inc. v. Helfer*, 224 F.3d 1117, 1121-22 (9th Cir. 2000). Thus, the four  
 factor test is the appropriate test for determining whether a private right of action exists in an action  
 governed by Nevada state law.

1 follow the regulations themselves and that such a remedy would be inconsistent with the goal of  
 2 the regulations; namely encouraging the school district and its students to work together and within  
 3 the system to resolve disputes based on perceived discrimination.<sup>12</sup> In fact, the regulations provide  
 4 an alternative avenue to the court system, without foreclosing that option, by which an aggrieved  
 5 individual may attempt to resolve grievance disputes. In essence, the school district gives  
 6 individuals the ability to resolve their problems internally if they wish, without mandating that they  
 7 give up their legal rights. When weighed in this light, the relevant factors discussed in *Cort* do not  
 8 imply a private right of action in the WCSD Administrative Regulations that would allow an  
 9 aggrieved student to sue the WCSD based on a violation of those regulations. Accordingly,  
 10 Plaintiffs' claim for relief must be dismissed.

### 11 **C. Plaintiffs' Request for Judicial Notice**

12 Plaintiffs request the court to take judicial notice of the decision entered in the Second  
 13 Judicial District Court of Nevada relating to the arrest of Everette. However, this court has already  
 14 determined that Everette has properly pled a violation of his Fourth Amendment rights. Judicial  
 15 notice of the state court proceeding would have no effect on the court's decisions in this action.  
 16 Therefore, judicial notice of the underlying state court action is not relevant to this proceeding. *See*  
 17 Fed. R. Evid. 402. Plaintiffs' request is denied.

18 IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss (# 22) is hereby  
 19 GRANTED in part and DENIED in part as discussed in this order.

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 23 <sup>12</sup> The regulation provides a brief note on its purpose and scope, stating: "The best solutions  
 24 are those that involve input from those closest to the concern. . . . At any time, a student may choose  
 25 to initiate the following grievance procedure along with having the legal right to file a grievance with  
 26 . . . a court of competent jurisdiction. . . ." WCSD Reg. 5144.21 at 3. Thus, the grievance procedure  
 is designed as an alternative to litigation in the courts with the purpose of using those closest to the  
 situation to work out an amicable solution outside of the court system.

1 IT IS FURTHER ORDERED that Plaintiffs' Request for Taking Judicial Notice of the  
2 decision entered in the Second Judicial District Court of Nevada (# 28) is hereby DENIED.

3 IT IS SO ORDERED.

4 DATED this 15<sup>th</sup> day of February, 2006.



7 LARRY R. HICKS  
8 UNITED STATES DISTRICT JUDGE  
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